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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TREVA ANN BOWLING,

Petitioner,

vs.

WILLIAM LEE BOWLING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Texas Court's Opinion, which establishes a conclusive presumption of future injury to the welfare of a child, solely because the unmarried mother dates a single, unmarried adult, a presumption which is then used to terminate the custodial rights of Petitioner, violate her constitutional right to due process and equal protection under the Fourteenth Amendment as stated by this Court in Stanley v. Illinois, 405 U.S. 645 (1972)?

2. Does the construction and application of the provisions of the Texas Family Code by the Texas Courts amount to an inflexible presumption which deprives Petitioner of her child, solely because of her dating an unmarried adult, and therefore infringe upon Petitioner's constitutional rights to due process and equal protection of the laws under the Fourteenth Amendment?

3. Does the construction and application of the provisions of the Texas Family code by the Texas Courts violate Petitioner's right to freedom of religion and right to privacy as guaranteed by the First Amendment of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

The Petitioner, TREVA ANN BOWLING, respectfully prays that a Writ of Certiorari issue to review the final decision of the Supreme Court of Texas entered in this proceeding on October 22, 1980, refusing to reverse the decision of the El Paso Court of Civil Appeals of April 30, 1980. The opinion of the Court of Civil Appeals in El Paso deprived Petitioner of the custody of her minor child solely because she was dating an unmarried adult male. All of the evidence demonstrated that

Treva Ann Bowling was a kind and affectionate mother and had not neglected her minor child in any way as a result of the relationship, and all of the evidence demonstrated that the minor child was a healthy, happy, and loving child.

OPINION BELOW

The original Opinion of the Court of Civil Appeals in El Paso is set forth in Appendix A to this Petition. The Opinion of the Supreme Court of the State of Texas refusing to grant a Writ of Error to Petitioner, because it found no reversible error in the decision, with a per curiam notation, is attached to this Petition as Appendix B.

JURISDICTION

The Opinion and Judgment of the Supreme Court of Texas was entered October 22, 1980. A timely Petition for Rehearing was filed and denied by the Supreme Court on December 3, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The State of Texas affords no further procedure to remedy the violation of Petitioner's constitutionally guaranteed rights. The notification from the Clerk of the Texas Supreme Court dated December 3, 1980, denying Peti-

tioner's Motion for Rehearing is attached to this Petition as Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISION

The constitutional provisions involved in this case are the Equal Protection clause and the Due Process clause of the Fourteenth Amendment. Also involved is the First Amendment right to Freedom of Religion and the violation of Petitioner's Right of Privacy, also guaranteed by the First Amendment of the United States Constitution. Also involved is the constitutional propriety of the statutory provisions of the Texas Family Code, §14.08(c). The text of this statutory provision in its pertinent part is set forth in Appendix D.

REASONS FOR GRANTING THE WRIT

The Courts of Texas, both the intermediate level and the Supreme Court, have created the use of a conclusive, irrebutable presumption in a child custody matter to terminate the custodial rights of Petitioner to her minor son. The Opinion of the intermediate court in this case, which the Texas Supreme Court refused to overturn by declining a Writ of Error, is in direct contravention to the principles enunciated by this Court in

Stanley v. Illinois, 405 U.S. 645 (1972). In Stanley, this Court held that the employment of an irrebutable presumption without hearing upon the fundamental interest of parents and their children in custody matters is an unconstitutional violation of the parents' right to Due Process and Equal Protection under the Fourteenth Amendment. Similarly, by resorting to the use of an irrebutable presumption in denying Petitioner the right of custody of her child, the Texas Courts have changed the focus in a child custody proceeding from the traditional concern of welfare and best interest of the child to a hearing which necessarily must focus upon the conduct of the custodial parent, without any regard to its effect upon the child. As with Stanley, the Texas Court's Opinion in the instant case and their use of such a presumption, irrationally and unjustly affects not only the constitutional rights of Treva Ann Bowling, but also the constitutional rights of millions of unmarried parents similarly situated in the United States, together with the same rights of their children.

The application of such a presumption created by the Texas Courts in child custody proceedings not only in Texas but in the Courts of our sister states discriminates as to status all of those single custodial parents who, after their marriage vows have been severed, choose to date persons of the opposite sex. By holding that Petitioner's "unconventional lifestyle" in this case creates an environment which might endanger the future welfare of the child without even evidence of possible detrimental effects to the child constitutes an established conclusive presumption which cannot be overturned. This presumption persists despite evidence to the contrary, and must inevitably result in the conclusion that because a single unmarried parent dates another person of the opposite sex, harm will occur to the child some time in the future.

According to the United States Census Bureau in 1978 there were twelve million children under the age of 18 in single parent homes. The Census Bureau further predicts that nearly all children born in the 1970s will spend a meaningful part of their lives before 18 in a single

parent home. If the instant decision is allowed to stand and harm presumed because of a single parent's decision to date another single person, the majority of the population of America could be affected. The consequences of letting the Texas Court's decision stand in the instant case is enormous and such a precedent cannot be allowed to stand to the detriment of constitutional rights because of what can only be motives of expediency.

STATEMENT OF THE CASE

This case involves a suit for modification of managing conservator or, more simply, a change of custody, which was brought by the natural father of the minor child, William Lee Bowling, against Treva Ann Bowling. The case was tried by a jury and they returned a 10-2 verdict in favor of the father, William Lee Bowling. The case was appealed to the Court of Civil Appeals in El Paso and the judgment of the Trial Court was affirmed, from which Petitioner perfected her appeal.

Upon appeal, the Eighth District Court of Civil Appeals at El Paso held that there was some evidence of a mater-

ial change of circumstances which would support the jury's finding as to injury to the welfare of the child by citing Petitioner's unconventional lifestyle as sufficient reason for the change of custody. The Petitioner thereinafter filed an Application for Writ of Error with the Texas Supreme Court which was refused because the Supreme Court found no reversible error. The Decision and Opinion of the Supreme Court was rendered October 22, 1980. Thereafter, Petitioner filed a timely Motion for Rehearing which was refused by the Texas Supreme Court on December 3, 1980. In Petitioner's Application for Writ of Error and her Motion for Rehearing, Petitioner contended that her First Amendment rights and Fourteenth Amendment rights had been violated by the decision and Opinion of the Eighth Judicial District Court of Civil Appeals at El Paso.

ARGUMENT

The Decision and Opinion of the Court of Civil Appeals at El Paso, Eighth Judicial District, establishes an irrebutable presumption by terminating the custodial rights of Treva Ann Bowling and,

thus, violated her constitutional rights to Due Process and Equal Protection of the laws under the Fourteenth Amendment, and further violated her right of Freedom of Religion and Right to Privacy as guaranteed by the First Amendment of the United States Constitution.

A. DUE PROCESS VIOLATION.

Petitioner is mindful of the fact that on September 29, 1980, this Court refused Certiorari in the case of Jarrett v Jarrett, ____ U.S. _____, 66 L.Ed. 2d 155. The significance of the Jarrett case lies in the fact that three Justices of this Honorable Court vigorously dissented in the refusal to grant Certiorari. In Justice Brennan's Dissenting Opinion, it was pointed out that the Court should address the constitutional question which was clearly presented because the answer to the question has important implications to many households. In Jarrett the divorced mother and her three children were actually living with and cohabiting with her boyfriend, a single unmarried man. The facts of the Jarrett case were much more extreme than the facts in the instant case. In the instant case, Treva Ann Bowling was not living with the man

dict from attack under the Due Process clause, particularly where the results of the hearing were based upon a conclusive presumption that the jury's finding must stand, a fact which Petitioner could not overcome by showing that her child was normal, healthy, and happy. See Bell v. Burson, 402 U.S. 535 (1971); and Jarrett v. Jarrett, 400 N.E. 2d at 427.

What may, perhaps, might, or could happen in the future without a connection between Petitioner's non-marital status and the effect upon the relationship with her child is nothing more than a speculative conclusive presumption.

The Court of Civil Appeals opinion in this case creates an irrebutable presumption which will be impossible for any normal unmarried woman to overcome. This is analogous to the presumption involved in Stanley v. Illinois, supra, created by a statute which assumed unmarried fathers are unfit to raise their children. The flaw in this reasoning was explained by the Supreme Court in the following manner:

> "Procedure by presumption is always cheaper and easier than individualized determination, but where, as here, procedure forecloses the

tioner and that man while in the presence of the child. The Court of Civil Appeals in passing upon sufficiency of the evidence in this case held that it was because of Petitioner's unconventional lifestyle alone that the jury verdict must be upheld.

The unconventional lifestyle as set forth in the statement of facts in the Court of Civil Appeals opinion consisted of the fact that Petitioner, on week-ends while the child was visiting his father, took trips out of town to various places such as Ruidoso, New Mexico, Del Rio, Texas, and Puerta Villarta, Mexico, with the man with whom Petitioner was dating. Respondent admitted that his child's attitude had actually improved after Petitioner began seeing the person that she was dating. Petitioner contends that by allowing the Court of Civil Appeals opinion and judgment to stand, a conclusive presumption of harm to the welfare of the child was established by the showing of Petitioner's conduct which occurred outside of the presence of the child, even though there was not one scintilla of actual evidence

of harm or danger to the welfare of the child presented.

It is well established that a parent's relationship with his or her children is one of the liberties to which due process must be accorded. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). It is equally well established that irrebutable presumptions have long been disfavored under the due process clause of the Fourteenth Amendment. Vlandis v. Kline, 412 U.S. 441 (1973). Accordingly, in those situations where a conclusive presumption has been employed to impair or affect child-rearing and parental rights, the Supreme Court of the United States has never hesitated to strike down the particular presumption involved. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) and Stanley v. Illinois, 405 U.S. 645 (1972).

In the instant case the opinion of the Court of Civil Appeals had made a radical departure from the constitutional safe-guards which were so vigorously protected in Stanley and LaFleur. The decision in this case, if left unturned, creates irrebutable and conclusive presumption of future harm to Petitioner's child

caused simply by her normal conduct as an unmarried person.

The fact cannot be ignored that the uncontroverted and undisputed proof clearly demonstrated that Petitioner was a kind and affectionate mother who took excellent care of her child. It was only her ex-husband's dissatisfaction of her dating another man that brought about the requested change in custody in this case. Not one shred of evidence was produced to show that the child involved was unhappy, unstable, neglected, upset or confused, nor was it shown that the child would have been subject to scorn or scandal in the community.

It is apparent, therefore, in order to reach the decision that it did, the jury and the Court of Civil Appeals in El Paso was required to rely upon baseless prediction, guess, speculation, conjecture, and presumptions of what might or could happen in the future without any evidence to show that injury to the welfare of the child was even likely to occur.

The fact that a hearing was held before a jury does not save the Court of Civil Appeals' holding nor the jury ver-

dict from attack under the Due Process clause, particularly where the results of the hearing were based upon a conclusive presumption that the jury's finding must stand, a fact which Petitioner could not overcome by showing that her child was normal, healthy, and happy. See Bell v. Burson, 402 U.S. 535 (1971); and Jarrett v. Jarrett, 400 N.E. 2d at 427.

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> "Procedure by presumption is always cheaper and easier than individualized determination, but where, as here, procedure forecloses the

> determinative issues of competence and care when it explicitly disdains present realities in deference to past formalities, it needlessly runs the risk of running roughshod over the important interests of both parents and child. It therefore cannot stand." Stanley v. Illinois supra.

There is little difference in the presumption created by the opinion of the Court of Civil Appeals and the statute in Stanley. The Supreme Court further condemned the use of a presumption to determine best interest and welfare in Stanley by saying:

> ". . . where the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . what procedures Due Process may require under any given set of circumstances must begin with the determination of the precise nature of the governmental function involved, as well as the private interest that has been affected." 405 U.S. 654 at 650.

> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. . . . Familial bonds in such cases were often as warm, enduring and important as those arising within a more formally organized family unit. 405 U.S. at 651, 652.

> "It may be as the state insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent, and that his children should be placed in other hands. But all unmarried fathers are not in this category. 405 U.S at 654. . .(The statute) insists on presuming rather than proving Stanley's unfitness, solely because it is more convenient to presume than to prove. Under the Due Process clause, that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family. 405 U.S. at 658.

It should be kept in mind that in the instant case the Petitioner was not cohabiting, but merely dating a man with whom she was not married. Courts of other jurisdictions have uniformly held that cohabitation between an unmarried male and female without the benefit of marriage is not per se evil or one of immorality, S. v. J.,267 N.W.S.2d 405 (1975).

The same conclusion was reached by the Ohio Supreme Court in In re: Burrell, 58 Ohio St. 2d 37, 338 N.E. 2d 38 (1979), which involved a situation where the mother was living with a man not her husband. In refusing to uphold a change of

custody based upon the mother's living arrangement, the Court held:

> "The conduct of the parent is relevant solely insofar as that parent's conduct forms part of the environment of the child. As part of the child's environment, such conduct is only significant if it can be demonstrated to have an adverse impact upon the child. Here such is not the case." In re: Burrell, 58 Ohio St. 2d 37, 388 N.E. 2d 38, (Ohio Sup. Ct., 1979).

In re: Marriage of Walter, 27 Or. App. 721, concerned a similar question. The Oregon court refused to resort to the use of a presumption, explaining:

> "While cohabitation may in many circumstances be injurious to the welfare of the child, we cannot say that in every circumstance conceivable or otherwise that cohabitation in any form would have such an effect. Examining the record, there is no evidence which indicates that the condition placed upon the award of custody is necessary to protect the children. The Court should make its decision in light of the actual rather than a speculative situation."

S. v. J., Burrell, and Walter are all consistent with and follow the Supreme Court's decision in Stanley v. Illinois, The Texas Courts, however, in explicitly rejecting the application of

Stanley, have ignored and seriously threatened the constitutional safeguards which this Court, and the courts of our sister states, have so carefully strived to protect.

The California Court of Civil Appeals in the case of Wellman v. Wellman, 164 Cal.Rptr. 148, also recognized the basic constitutional rights of a parent raising a child. The Court at page 151 noted:

> "The Courts have frequently warned that a judge should not base his decision upon his disapproval of the morals or other personal characteristics of a parent that do not harm the child. This admonition seems particularly appropriate where what is involved is freedom of association and sexual conduct between mature consenting adults. As our state Supreme Court has explicitly recognized, non-marital relationships are pervasive in current society, and mores in regard to cohabitation have changed radically, so that courts cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Moreover, such conduct has been held to be within the penumbra of constitutional protection afforded the rights of privacy as well as the rights of a parent as previously discussed so that intrusion by the state in this

sensitive area is not a matter to be undertaken lightly."

The Court further, after noting that sexual conduct may be relevant in denying a custody dispute only where there is compelling evidence that such conduct has significant bearing on the child, held that an inquiry into the sexual conduct of an unmarried parent was so intrusive upon the privacy and associational interests of the mother that the Trial Court's finding could not be sustained.

B. THE EQUAL PROTECTION VIOLATION.

The overall impact of the instant decision is potentially overwhelming since the Court of Civil Appeals in El Paso has effectively established a unique classification of unmarried parents that date and associate with members of the opposite sex, and has arbitrarily discriminated against Treva Bowling and all those parents similarly situated by denying them the equal protection of the laws. In its personalized, subjective judgment seeking to uphold and strengthen the institution of formal marriage, but

without any objective evidence and study, the Court has plunged in "running roughshod" (Stanley v. Illinois, 405 U.S. 645 at 656) over the important rights of literally millions of similarly situated parents and their children. Although the Court of Civil Appeals in El Paso feels that the Petitioner had an unconventional lifestyle by dating and traveling with another unmarried person wholly outside of the presence of the child, the U.S. Bureau of Census some 3 1/2 years ago showed that there were 1.1 million unmarried parents living with others in the presence of their children. U.S. Bureau of Census, Current Population Report, p. 20, No. 23, "Marital Status and Living Arrangements" March, 1977. In the face of these figures the fact that Petitioner was dating another and traveling with him on week-ends when the child was with his father certainly seems to indicate that the opinion of the Court of Civil Appeals in El Paso might be slightly more unconventional than Petitioner's lifestyle which the Court condemned. The purpose of Petitioner citing these figures is simply to demonstrate a nationally existing social phenomenon in which the equal

protection rights of more and more people are being threatened each day. According to the Court of Civil Appeals in El Paso, the ex-husbands of single parents now need only show that the present custodian is dating a member of the opposite sex and traveling on weekends with him outside of the presence of the child. With such a rule, the likelihood of arbitrariness by judge and/or jury is terrifically immense. Moreover, such a classification totally disregards the principles as formulated by §14.08(c) of the Texas Family Code which provides as follows:

> "after a hearing, the Court may modify an order or portion of a decree that:
>
> (1) designates a managing conservator if the circumstances of the child or parent have so materially and substantially changed since the entry of the order or decree to be modified that the retention of the present managing conservator would be injurious to the welfare of the child and that the appointment of the new managing conservator would be a positive improvement for the child;" (Emphasis added)

Without justification in law or fact, the Court of Civil Appeals in El Paso has singled out a sub-class of par-

ents whose status, per se, is a controlling justification for termination of their parental rights. In other circumstances, the existence of such a relationship or conduct, would not and could not be controlling. It is this differential treatment which fails to meet the rational relationship test of the Equal Protection clause of the Fourteenth Amendment. Dandridge v. Williams, 397 U.S. 471 (1970). There is simply no nexus between the uniquely disabling class characteristics established by the Court of Civil Appeals' opinion, and all other possible types of custodial conduct. Furthermore, no nexus exists between this class of unmarried parents and the presumed harmful efect on their children.

The irrebutable presumption which Petitioner complained about under the Equal Protection portion of this argument is not and has not ever been the law of the State of Texas. Under the Texas Family Code the burden is always upon the movant seeking the change to show that the retention of status quo would be injurious to the welfare of the child. Indeed, if any presumption exists in Texas, it exists in favor of the original

custodian. The Petitioner herein is asking no more or no less than the law be applied to her fairly as it should be to any unmarried female parent, and should afford her the equal protection of any other type of citizen.

C. EQUAL RIGHTS ARGUMENT:

As pointed out in the Texas Courts the Equal Rights Amendment was passed by the Texas Legislature and voters in 1973. Petitioner believes that her conduct of dating and traveling with another unmarried person of the opposite sex would be viewed much differently by the Court of Civil Appeals in El Paso had she been a man and not a woman. In passing upon the sufficiency of the evidence, assume for the purposes of argument that the situation were in exact reverse; that instead of being an unmarried female parent, Petitioner herein was an unmarried male parent defending a change of custody sought by his ex-wife because he had traveled to Del Rio, Ruidoso, and Puerta Villarta with an attractive unmarried female on week-ends while Petitioner's child was with her on visitation periods. In such a case it is not hard for Petitioner to imagine the attitude of

the three Justices of the Court of Civil Appeals in Paso. Would they then consider the lifestyle of an unmarried male "unconventional" for undertaking such travels with an attractive female guest?

Petitioner respectfully submits that the outcome in such a case would be exactly the opposite from the case at bar, and that because of Petitioner's status as a woman, her status itself was outcome determinative.

D. FREEDOM OF RELIGION VIOLATION:

Other than Petitioner's "unconventional lifestyle", the only evidence cited by the Court of Civil Appeals in El Paso as to why her retention of custody of her child would be injurious to his welfare was the fact that Petitioner no longer took her child to church on Sunday. Petitioner believes that merely by citing this as evidence to sustain a jury verdict violates her and her child's right of freedom of religion as guaranteed to them by the First Amendment of the Constitution of the United States. (The Court of Civil Appeals simply chose to ignore the fact disclosed in evidence that Petitioner encouraged her child as to his religious beliefs and that actual-

ly the child was attending church twice as much at the time of the trial than he was at the time she and Respondent were married.)

Constitutionally speaking, the evidence as stated by the Court of Civil Appeals concerning the child's church attendance cannot be considered relevant as a change of circumstances as a matter of law. Watt v. Watts, 563 S.W. 2d 314 (Tex.Civ. App. --Dallas, 1978;) Salvaggio v. Barnett, 248 S.W. 2d 244 (Tex.Civ.App. --Galveston 1952); Noyles v. Jack, 443 S.W. 2d 89 (Tex.Civ.App. --Beaumont, 1969; and Frantzen v. Frantzen, 349 S.W. 2d 765 (Tex.Civ.App. --San Antonio, 1961).

The quotation by the Court in Frantzen, supra, is applicable in this case:

> "moreover, one's religious beliefs, teachings and practices are not grounds for depriving a parent of his or her children, so long as such teachings and practices are neither immoral nor illegal. Appellant has cited no authorities to the contrary, and we have found none."

In Salvaggio v. Barnett, supra, the Court recognized the First Amendment issue in construing the effect of the

Texas Bill of Rights as to child custody cases and said as follows:

> "in choosing between parents who are contending for the custody of the child, a magistrate has only such powers as the law has conferred upon him to determine whose custody would best promote the interest and welfare of the child. Under the American principle of separation of Church and State, the secular power is so shackled and restrained by our fundamental law that it is beyond the power of a court, in awarding the custody of the child, to prefer, as tending to promote the interest of the child or surround it with a more normal atmosphere, the religious views or teachings of either parent."

Certainly if it is beyond the power of a judge to consider the religious preference of either parent in a child custody case, it is beyond the power of a jury to take such evidence into account, and even more importantly, it is beyond the jurisdiction of the Chief Justice of the Court of Civil Appeals to consider the evidence of the church attendance of the young child as a material and substantial change of circumstances involving the welfare of the child.

E. RIGHT OF PRIVACY VIOLATION: The Supreme Court of the United

States recently in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, recognized the citizens have a First Amendment right to privacy which is not political in the customary sense, but pertains to the social, legal, and economic associations. Certainly after Petitioner's divorce from Mr. Bowling, she had the right to choose her own lifestyle and even though Mr. Bowling may have disapproved of the lifestyle Petitioner chose, her right to so choose should not be grounds for a change of custody unless the lifestyle chosen had a detrimental effect upon the welfare of the child. As recognized by Judge Learned Hand in Schmidt v. U.S., 177 F.2d 450, 452 (Second Circuit, 1947), an unmarried man does not forfeit his claim to good moral character by not choosing to live completely celebate, so then certainly the First Amendment of the United States Constitution and Article 1, §3a of the Texas Constitution which declares "equality under the law shall not be denied or abridged because of sex, race, color or national origin" protects the Petitioner in her right to choose her

lifestyle and remain unmarried.

While the Supreme Court did not definitely state that the zone of privacy recognized in Griswold v. Connecticut, supra, included consentual sexual behavior among adults, several lower courts have answered that question in the affirmative. See State v. Saunders, 381 At. 2d 333, 339-40; Mindel v. U.S. Civil Service Commission, 312 F. 2d Supp. 485; Major v. Hampton, 413 F. 2d 66, 70; Goodrow v. Perrin, 403 At. 2d 864, 865, 866. As the New Jersey court reasoned in Saunders, supra, it would be rather anomalous if a person's decision to bear or beget children could be constitutionally protected while the fundamental decision as to whether or not to engage in the conduct which is a necessary prerequisite to child bearing would not be constitutionally prohibited.

The California Supreme Court refers to a constitutional right of privacy in matters related to marriage, family and sex. See People v. Belous, 458 P.2d 194, 199. Also see Wellman v. Wellman, supra.

Petitioner cannot over-emphasize the fact that her ex-husband had absolutely

no complaints of her as a mother, but objected to her spending time with her boyfriend because they were not married. (S.F. p. 99, 100, 101).

The Texas Courts have long recognized such a right of privacy in family matters In Heiskell v. Heiskell, 412 S.W. 2d 774, 776 (Tex.Civ.App. --Amarillo, 1967; n.w.h.) Justice Northcutt stated:

> "Moreover, the actions and conduct of one of the parties to the divorce which gives offense to the other, or even to the public at large, are not a matter that calls for or permits a change of custody unless such actions and conduct are shown to affect the welfare and best interest of the child." (Emphasis added.)

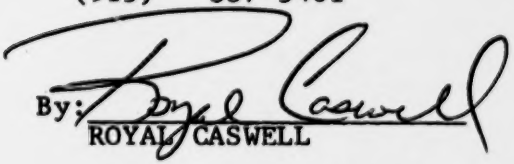
Since there is not a scintilla of evidence to show that Petitioner's son was anything other than a normal, healthy, above-average child with no physical or mental problems, Petitioner strongly urges that her right of privacy was infringed upon by the opinion of the Court of Civil Appeals in this case which stated that her unconventional lifestyle was sufficient to support the answers of the jury verdict.

F. CONCLUSION:

For the reasons set out above, Petitioner, Treva Ann Bowling, respectfully submits that her constitutionally guaranteed rights as guaranteed to her by the First and Fourteenth Amendments have been violated, and further respectfully requests that this her Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROYAL CASWELL
217 West Third Street
Odessa, Texas 79761
(915) 337-5461



By: ROYAL CASWELL

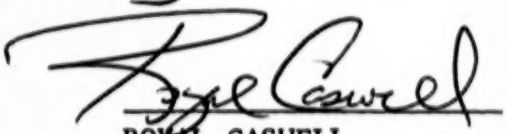
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition for Writ of Certiorari has been mailed to:

Mr. Bill McCoy
Attorney at Law
308 North Jackson
Odessa, Texas 79761

attorney of record for Respondent, this the 28th day of May, 1981.



ROYAL CASWELL

APPENDIX A

IN THE COURT OF CIVIL APPEALS

FOR THE EIGHTH SUPREME JUDICIAL DISTRICT

AT EL PASO, TEXAS

April 30, 1980

T.A.B.,

Appellant,

v.

W.L.B.,

Appellee.

Appeal from the District Court

of Ector County, Texas.

Chief Justice Stephen F. Preslar delivered the opinion of the Court:

T.A.B. appeals from an order removing her as managing conservator of her six-year-old son and appointing her former husband, W.L.B., as managing conservator. Trial was to a jury which returned a verdict on two special issues

finding (1) that the circumstances of the child or T.A.B. have so materially and substantially changed since the divorce judgment that the retention of T.A.B. as custodian of the child would be injurious to his welfare, and (2) that the appointment of W.L.B. as custodian of the child would be a positive improvement for the child. Questions as to the sufficiency of the evidence to support those jury findings and the failure of the Court to grant a mistrial or new trial because of the improper conduct between a jury and a witness are presented. We affirm.

The two jury issues track Section 14.08(c)(1), Tex. Family Code Ann. (Supp. 1980), which provides that after a hearing the court may modify an order or a portion of the decree that:

> (1) designates a managing conservator if the circumstances of the child or parent have so materially and substantially changed since the entry of the order or decree to be modified that the retention of the present managing conservator would be injurious to the welfare of the child and that the appointment of the new conservator would be a positive improvement for the child; . . .

Appellant assigns error in that the Court failed to grant her motion for instructed verdict because there is no evidence to support either of the jury findings. Error is also assigned to the Court's overruling Appellant's amended motion for a new trial because of the factual insufficiency of the evidence to support the issues.

Section 11.13, Tex. Family Code Ann., provides for a jury trial in all suits affecting the parent-child relation-

ship except adoptions. Prior to its amendment effective September 1, 1975, sub-paragraph b of Section 11.13, by rather conflicting language, provided that the judgment of the court must conform to the jury's determination. The Code provision was an amendment of Article 4639a in effect since 1961, and, in 1974, the Corpus Christi Court of Civil Appeals in In re Y, 516 S.W. 2d 199 (writ ref'd n.r.e.), reviewed prior decisions and expressly held that the jury verdict was binding on the trial court. See also Taft v. Johnson, 553 S.W. 2d 408 (Tex.Civ.App. --El Paso 1977, writ ref'd. n.r.e.). Any doubt as to the finality of the jury verdict has been removed by the 1975 amendment of Section 11.13 which provides:

> (b) The court may not enter a decree that contravenes the verdict of the jury, except with

> respect to the issues of the specific terms, conditions of access to the child, support of the child, and the rights, privileges, duties and powers of conservators, on which issues the verdict, if any, is advisory only (emphasis supplied).

The trial Court had the power to grant Appellant's motion for a directed verdict. Becerra v. Garibaldo, 526 S.W. 2d 780 (Tex.Civ.App. --Corpus Christi 1975, writ ref'd. n.r.e.). In the face of the language of the Statute, it cannot enter a decree that contravenes the verdict of the jury once it is rendered. As will be seen from the evidence to be discussed, there was evidence of probative force on the issues complained of and the Court did not err in overruling Appellant's motion for directed verdict. Burt v. Lochausen, 151 Tex. 289, 249 S.W. 2d 194 (1952).

Appellant has points of error that there is no evidence to support the jury's answers. This poses the question of whether we should consider such points, for to uphold them would require rendition of judgment, as distinguished from remand. Section (b) of the Statute is in contravention of Rule 302, Tex.R.Civ.P., which provides "the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence." The language of the Legislature is clear that as to these matters we cannot enter a judgment that contravenes the verdict of the jury. Therefore, we decline to consider the "no evidence" points.

The trial Court could have granted a motion for a new trial, Becerra v. Garibaldo, supra, and we turn to a review of the factual sufficiency of the evidence. In reviewing "factual sufficiency" points of error, the Court considers all of the evidence to determine whether the findings are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951). The parties were divorced November 5, 1976, and this case came to trial in December of 1978. The evidence is that Appellant remarried within a month of the divorce, and separated from this husband within two months. She then moved from Odessa to McCamey, Texas, and stayed there some two months, and was unemployed for one of those months. Prior to moving to McCamey,

Appellant met W.H., and began dating him in March of 1977, and soon moved back to Odessa and took a secretarial job from mid-April until late June of 1977. In June, she divorced the second husband. From June of 1977 until September, Appellant was unemployed, lived with her mother, but much of her time was spent with W.H. She and her child would get up each morning and go to his house, often have breakfast there, and spend the day using the swimming pool and other things. She would fix dinner for W.H., and would remain for the evening until 10:00 or 10:30 p.m., although a number of times it was much later. This routine occurred every day "except for a few days" for some two-and-a-half months, and, in addition thereto, Appellant and W.H. would spend alternate weekends out of town, often in

Del Rio where he had a sailboat. The child did not accompany them on these weekend ventures where they stayed in a motel, but did accompany them other times when they made other trips, particularly to W.H.'s cabin in Ruidoso. Trips to Mexico were also taken. The evidence is that Appellant and W.H. did not sleep together when the child was present. Following this summer program, Appellant obtained employment, but she and the child continued to have dinner and spend their evenings at the home of W.H. She also continued her weekend trips, and she had the use of his car and credit card. This relationship with W.H. continued up until the time of trial, except for a brief period when they "broke up" and he dated others. There was evidence that Appellant stopped taking the child to church, which

she had done prior to her divorce from W.L.B., and there is evidence that Appellant uses some profane or vulgar language in front of the child, but there is no evidence that this was or was not done before. In the two-year period since the prior order, Appellant has lived in four different places of residence and has had three different jobs.

Appellant first questions the finding of a material change of circumstances on the basis that no evidence was introduced regarding the circumstances of the child or Appellant at the time of the divorce or the prior order; therefore, it was impossible for the jury to deduce that a change in circumstances had occurred. The method of showing this change is not prescribed by the Family Code. Neither of the two Supreme Court cases relied on by

Appellant, Bukovich v. Bukovich, 399 S.W. 2d 528 (Tex. 1966), or Knowles v. Knowles, 437 S.W. 2d 816 (Tex. 1969), appear to mandate a particular mode of proof, and therefore do not support Appellant's assertion. Two cases appear to support Appellant's position. In Davis v. Duke, 537 S.W. 2d 519 (Tex.Civ.Cpp. --Austin 1976, no writ), the Court found that the appellant had failed to prove the conditions that existed at the time of the entry of the custody decree, but it also held that appellant failed to prove the present conditions, so the case is not authority for Appellant's position here, for the judgment could have been upheld on either finding. In Watts v. Watts, 563 S.W. 2d 314 (Tex.Civ.App. --Dallas 1978, writ ref'd n.r.e.), the Court stated that "[t]o show such a change, evidence must be

tendered showing the circumstances at the time of the prior order and the circumstances existing at the time of the hearing on the motion to modify." We have no quarrel with that statement as being one method of showing change, but are unable to accept it as being the only way of showing change and that "evidence must be tendered showing the circumstances at the time of prior order." The two cases, Bukovich v. Bukovich and Knowles v. Knowles, are cited as the authority for the statement, and they do not support such a statement as being the law of Texas. The requirement is that a change must be shown. Any method of proof which does that satisfies the Statute.

In Colbert v. Stokes, 581 S.W. 2d 770 (Tex.Civ.App.--Austin 1979, no writ), the Court was faced with the same conten-

tion that we have here; that is, that there must be evidence showing the circumstances of the child or parent at the time of the divorce or the prior order. There was no such evidence, but the Court held that the jury could find a substantial change in circumstances based on the mother's unconventional marital lifestyle which began after the divorce. The case is very similar to the one before us, and the Court recited evidence that the mother had married, divorced, remarried and divorced the same man in six years. Further, during the second go-round with her new husband, she took the children to live with another man. Said the Court: "It is plain that appellant's conduct, outlined above, occurred subsequent to the entry of the original order. It is equally manifest that such conduct constituted a

material and substantial change of conditions that affected appellant's situation and the Stokes children's interest. Wallace v. Fitch, 533 S.W. 2d 164 (Tex. Civ.App. 1976, no writ)." In the case before us, Appellant's unstable lifestyle is new and different and constitutes a change in that it occurred after the prior divorce. It began with her quick marriage within the month and a quick separation, changes of residence, the relationship with W.H. which began after the first divorce but before the second one, and it continued for some eighteen months. This lifestyle to which the child was subjected supports the jury finding that the circumstances of the child or T.A.B. have materially changed. Direct evidence of a change was that, prior to the divorce, the child was taken to church but that he does

not now attend church when he is with Appellant.

When all of the evidence is considered, we are of the opinion that it is factually sufficient to show that, as a result of the changed circumstances, Appellant's continued custody of the child is injurious to the child's welfare. "Welfare" is not defined by the Code, and Appellant here argues that it necessarily includes a showing of injury to a child's "physical or emotional" welfare. Appellee urges that the word "welfare" is not limited to physical and emotional welfare, but also includes the child's "moral" welfare. He cites Section 14.01(b)(2) which imposes the duty on the managing conservator to provide "moral and religious training." He also cites decisions that recognize the morality of, and the moral envi-

ronment provided by, a custodian as relevant factors in determining custody. Mumma v. Aguirre, 364 S.W. 2d 220 (Tex. 1963), speaks of "the best atmosphere for the mental, moral and emotional development of the child." In De Llano v. Moran, 333 S.W. 359 (Tex. 1960), the Court recognized the importance of providing a child with the "affection, care and guidance that are essential to . . . physical, mental and moral development." As the facts of this case relate to the child's moral welfare, then, that is an element that the jury could have considered on the issue of retention of T.B. as custodian being injurious to his welfare. It is but one element, however, but, considered with those which we have previously pointed out as to the overall lifestyle to which the child has been subjected for

the past two years, it affords support for the jury's verdict.

We are also of the opinion that the evidence supports the jury finding on Special Issue No. 2--that a change to the custody of the father would be a positive improvement. Considering all of the evidence, the finding is not so against the great weight and preponderance of the evidence as to be manifestly unjust. We agree with Appellant that the fact of the remarriage of the husband standing alone is not enough; it could be a good or bad marrige as to the child's welfare. What counts is the quality of the home established by that marriage. The evidence is that the husband in this case had remarried, his wife has a child by a prior marrige, and they have a child by this marriage. They own their home and have a

stable homelife. The father has been in the same employment for five years, and the wife does not work, but stays home with the children. There is testimony that the father and his new wife and children comprise a "warm family" and a "well adjusted home." The requirement of the Statute that there must be a "positive improvement" invites comparison between the environment provided by the mother and the new environment provided by the father, and the evidence demonstrates that the child will be better off and his welfare improved in the custody of the father.

Appellant assigns error for jury misconduct in concealment of information by a juror on voir dire. Juror Ward did not respond to a question by Appellant's attorney asking the panel if any of them

knew one Ron Davis. Following selection of the jury, and prior to presentation of the evidence, Ward and Davis were seen engaged in conversation in the hallway by the Court Bailiff who admonished them, and they broke up the conversation. On motion for new trial, evidence was presented which shows that the relationship of the two men was very casual; that the juror Ward only knew Ron Davis by the name Davis, and both men testified that their conversation in the hallway did not involve the case. Rule 327 of the Texas Rules of Civil Procedure controls the granting of a new trial for jury misconduct, and, as material here, that Rule provides that when the "ground of the motion is misconduct of the jury . . . or because of any communication made to the jury or that they received other testi-

mony, or that a juror gave an erroneous or incorrect answer on voir dire examinatin, the Court . . . may grant a new trial if [said action] be material, and if it reasonably appears from the evidence . . . that injury probably resulted to the complaining party." The trial Court apparently found no misconduct because there was no intentional failure to answer the question, witness and the juror were only casual acquaintances, and their brief interlude did not include discussion of the case. Mitchell v. Burleson, 466 S.W. 2d 646 (Tex.Civ.App. --Beaumont 1971, writ ref'd n.r.e.). The witness, Ron Davis, was not in the courtroom at the time of the voir dire examination and was not seen by the prospective juror, and it would seem that there was no intentional

concealment on his part in not responding to the question. The trial Court was correct in overrruling the motion for new trial, even if we assume jury misconduct, because its materiality and probable injury were not established by the evidence. Fountain v. Ferguson, 441 S.W. 2d 506 (Tex. 1969).

All points of error have been considered, and all are overruled. The judgment of the trial Court is affirmed.

APPENDIX B

T.A.B., Petitioner,

v.

W.L.B., Respondent.

NO. B-9589.

Supreme Court of Texas.

Oct. 22, 1980.

Appeal from El Paso Court of Civil Appeals. Eighth Supreme Judicial District: Preslar, Justice.

Appeal from District Court No. 161, Ector County: McKim, Judge.

Barnes & Lewis, W. R. Barnes and Tryon D. Lewis, Odessa, for petitioner.

Bill McCoy and John W. Cliff, Odessa, for respondent.

PER CURIAM.

The application for writ of error

is refused, no reversible error. 598 S.W. 2d 936.

This action is not to be construed as approving the language of the court of civil appeals that §11.13(b) of the Texas Family Code prohibits an appellate court from considering no evidence points properly raised on appeal.

APPENDIX C

CLERK'S OFFICE - SUPREME COURT

Austin, Texas, December 3, 1980

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of No. B-9589, T.A.B. vs. W.L.B. was this day OVERRULED.

Very truly yours,

GARSON R. JACKSON, CLERK

APPENDIX D

§14.08. MODIFICATION OF ORDER

(c) After a hearing, the court may modify an order or portion of a decree that:

(1) designates a managing conservator if the circumstances of the child or parent have so materially and substantially changed since the entry of the order or decree to be modified that the retention of the present managing conservator would be injurious to the welfare of the child and that the appointment of the new managing conservator would be a positive improvement for the child; or

(2) provides for the support of a child, sets the terms and conditions for access to or possession of a child, or prescribes the relative rights, privileges, duties, and powers of conservators if the circumstances of the child or a person affected by the order or portion of the decree to be modified have materially and substantially changed since the entry of the order or decree; except that an order providing for the support of a child may be modified only as to obligations accruing subsequent to the motion to modify. (Emphasis added.)

Office-Supreme Court, U.S.
FILED
AUG 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1980
No. 80-2012

TREVA ANN BOWLING,

Petitioner,

VS.

WILLIAM LEE BOWLING,

Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BILL McCOY
308 North Jackson
Odessa, Texas 79761
(915) 332-1471
ATTORNEY FOR
RESPONDENT

OF COUNSEL:

JOHN W. CLIFF, JR.
307 North Grant
Odessa, Texas 79761
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OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals in El Paso (Pet. App. A) is reported at 598 S.W.2d 936. The per curiam opinion of the Supreme Court of Texas refusing to grant Petitioner a Writ of error (Pet. App. B) is reported at 606 S.W.2d 695.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. §1257(3). Respondent denies that such jurisdiction exists.

QUESTIONS PRESENTED

(1) Has Petitioner affirmatively demonstrated that the Federal questions involved were presented to and either decided by or necessary to the judgment of the Texas Supreme Court so as to invoke the jurisdiction of this Court?

(2) Does the Texas Court's Opinion, affirming a jury verdict which changed custody from Petitioner to Respondent, create a conclusive presumption and thereby raise due process and equal protection questions?

(3) Does the construction and application of the provisions of the Texas Family Code by the Texas Courts, which permits the jury to consider Petitioner's lifestyle along with other evidentiary matters, raise due process, equal protection or right of privacy questions?

(4) Does the construction and application of the provisions of the Texas Family Code by the Texas Courts, which permits the jury to consider the church attendance of the minor child along with other evidentiary matters, raise freedom of religion questions?

STATUTES INVOLVED

The only statute involved except those cited by Petitioner is 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

With full awareness of, and in fact because of, Supreme Court Rule 40(3), Respondent submits the following factual statement of this case.

Petitioner and Respondent were divorced in Odessa, Texas, on November 15, 1976, and Petitioner was awarded custody of the parties' three year old boy. Before the end of the same year Petitioner remarried,

and in two months separated from her new husband and met W.H. She then moved out of town for two months, at which time she began dating W.H. and held down a job for one month. In mid-April of 1977 Petitioner moved back to Odessa and obtained employment for about 2½ months. Toward the end of this brief period of employment she obtained a divorce from her second husband.

By late June of 1977 Petitioner was again unemployed. At this time she and the minor child began spending most of their time with W.H. and/or around his home. They would get up and go to W.H.'s house each morning, often eat breakfast with him, spend the day around his house, fix dinner for him when he arrived home and remain at his home until 10:00 p.m. or later. This was a regular weekday routine, with rare exceptions, for two and one-half months.

On the week-ends during this period of time Petitioner and W.H. would usually travel out of town, accompanied by the child on the alternate week-ends

that Respondent did not have visitation privileges. Although Petitioner and W.H. did not sleep together when accompanied by the child, they did all stay in W.H.'s cabin in Ruidoso on occasion.

In or about September of 1977 Petitioner went back to work. However, her relationship with W.H. endured, consisting in part of dinners and evenings at his home and more weekend trips. This relationship continued, except for a brief "separation", up until the time of trial in December of 1978.

Following a two day trial in which all the foregoing facts were presented to a jury, the jury found there had been such a change in the circumstances of the Petitioner and the child since November of 1976 that Petitioner's continued custody of the child would be injurious to the welfare of the child. The jury further found that Respondent's custody of the child would be a positive improvement for the child.

Bound by this jury verdict the trial court entered its judgment changing custody of the child to Respondent.

The Court of Civil Appeals concurred that the evidence was sufficient to sustain the jury's finding and affirmed. In its Motion for Rehearing Petitioner first asserted (without briefing or arguing) the constitutional issues raised herein. Such Motion was overruled without opinion and the Texas Supreme Court, in a per curiam decision which did not address any of the constitutional issues, denied a writ of error.

ARGUMENT

Petitioner asserts the jurisdiction of this Court under 28 U.S.C. §1257(3). However, Petitioner makes no attempt in her brief to show the factual basis for such jurisdiction. Respondent contends that the reason for such omission is simple: the record does not demonstrate any basis for this Court's jurisdiction.

With regards to the merits of the case, Respondent urges that the decisions and opinions of the

Texas appellate courts in this case did nothing more than sustain the sufficiency of the evidence relied upon by the jury in affirmatively answering the special issues submitted to it. Petitioner takes only a portion of this evidence, denominates it as an "irrebutable presumption" and proceeds to argue that the Texas Courts' reliance on such a presumption is unconstitutional.

JURISDICTION

Petitioner asserts that this Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. §1257(3). This Court has consistently held that the mere existence of a "Federal question" is insufficient to invoke its jurisdiction under this statute. Of equal importance is the requirement that such questions have been presented to and either decided by or necessary to the judgment of the highest state court to which the writ is granted. As this Court stated in Lynch v. New York ex rel Pierson, 293 U.S. 52 (1934):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a State that it must appear from

> the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision on the federal question was necessary to the determination of the cause and that it was actually decided or that the judgment rendered could not have been rendered without it. (Citations omitted)."

293 U.S. at 54 (emphasis added).

On the basis of the record currently before this Court (consisting of Appendices A and B to Petitioner's Brief) there is no indication that a Federal question has ever been presented to any Texas Court. Consequently, on the basis of the record, this Court has no jurisdiction.

Since Petitioner may, in view of this omission, hereafter certify portions of the record pursuant to Supreme Court Rule 12, Respondent further argues that the record will fail to demonstrate this Court's jurisdiction.

The record will show that Petitioner asserted (without briefing or arguing) a plethora of federal

questions in her Motion for Rehearing in the Court of Civil Appeals. After such Motion was overruled (without opinion), Petitioner raised her equal protection, equal rights, right of privacy and freedom of religion arguments in her Application for Writ of Error to the Texas Supreme Court. In denying the application, the Texas Supreme Court made no mention of the federal questions but merely found no reversible error in the judgment of the Court of Civil Appeals. See, Respondent's Appendix B.

Assuming then that at most four of Petitioner's five constitutional issues were presented to the Texas Supreme Court, the next inquiry is whether such federal questions were either "actually decided (by the Texas Supreme Court) or that the judgment rendered could not have been rendered without deciding (them)." Lynch, supra., at 52.

Since the opinion of the Texas Supreme Court clearly does not address the federal questions, this Court's jurisdiction depends on whether or not the

judgment rendered could have been rendered without deciding such questions.

When the highest State court fails to address a federal question presented to it, the presumption is that such failure is the result of the aggrieved party's failure to properly present it to the State court. Street v. New York, 394 U.S. 576 (1969). The aggrieved party thereafter has the burden of affirmatively showing the contrary to sustain jurisdiction. Id. Hence, under the current state of the record (before this Court and otherwise), it is presumptively established that the judgment of the Texas Supreme Court could have been rendered without deciding the federal questions presented. This Court therefore has no jurisdiction.

Respondent does not, however, rely solely on this presumption. Under Texas appellate procedure Petitioner's federal questions were not properly preserved for presentation to the Texas Supreme Court.

The Texas Supreme Court has frequently held that a point not assigned as error in the Court of Civil

Appeals cannot be considered by the Supreme Court. Watson v. Glenn Falls Insurance Company, 505 S.W.2d 793 (Tex. Sup. 1974); Texas State Highway Department v. Fillmon, 150 Tex. 460, 242 S.W.2d 172 (1951); Edwards v. Strong, 147 Tex. 155, 213 S.W.2d 979 (1948). This requirement is not satisfied merely by raising the matter in a Motion for Rehearing in the Court of Civil Appeals. Watson, supra. and Fillmon, supra.

In conclusion, Petitioner has failed to show the federal questions presented here were ever presented to the Texas Supreme Court. When and if she does so, Petitioner cannot show either that the Texas Supreme Court actually acted on such federal questions or that the judgment of the Texas Supreme Court could not have been rendered without deciding such questions. Consequently, this Court lacks jurisdiction and should deny the writ of certiorari accordingly.

Petitioner's Due Process Argument

It must be emphasized at the onset that this Court's jurisdiction to consider Petitioner's due process claim rests on even weaker ground than the other constitutional issues presented. The only mention of an alleged violation of Petitioner's due process rights in the Courts below is in the first line of Paragraph X of Petitioner's Motion for Rehearing in the Texas Supreme Court and is accompanied by neither argument nor authorities.

With regards to the merits of Petitioner's argument Respondent urges that there is none. This argument, like the others put forth by Petitioner, is premised on an inaccurate picture of the facts and a legally erroneous conclusion therefrom.

Factually, Petitioner has presented the Court with an incomplete recitation of the evidence in the case. This is illustrated by the following quotations from Petitioner's brief:

> "The only evidence upon which the jury verdict could have been based . . . was the fact that on week-ends while the child was visiting his father, Petitioner traveled out of town and stayed with the man that she had been dating for approximately two years." (Pet. Brief at 10-11) (emphasis added).
>
> "The Court of Civil Appeals in passing upon sufficiency of the evidence in this case held that it was because of Petitioner's unconventional lifestyle that the jury verdict must be upheld." (Pet. Brief at 11).

The fact is that the jury's verdict in this case was based on much more than just Petitioner's dating habits. Petitioner, within eight months after getting custody of the minor child: (1) remarried; (2) separated (3) divorced; (4) moved twice; (5) was employed, unemployed, employed and unemployed again; and (6) met W.H. and started dating him (before being divorced from her second husband). As the Court of Civil Appeals stated, Petitioner's relationship with W.H. was just "one element" which afforded support for the jury's verdict.

It is these additional facts which also differentiate this case from Jarrett v. Jarrett, _____U.S._____, cited by Petitioner. In Jarrett there was no other evidence to support the change of custody except Mrs. Jarrett's relationship with Mr. Hammon. See, Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1980). In this case the jury not only had Petitioner's relationship with W.H. to consider, but also evidence of Petitioner's marital, employment and residential instability. Moreover, even when considered through Petitioner's narrow viewfinder, this Court's denial of writ in Jarrett supports a similar action in this case.

Petitioner's reliance on this Court's decision is Stanley v. Illinois, 405 U.S. 645 (1972) is also misplaced. In Stanley, it was held that a state statute denominating an unwed father as per se unfit to have custody of his off-spring denied such father due process and equal protection.

However, there is no such "irrebutable pre-

sumption" in this case. Respondent has never argued that Petitioner's lifestyle automatically disqualifies her to have custody of her minor child, nor did the Texas Courts in this case create such a presumption. All that has been urged and ruled on is that Petitioner's lifestyle is a relevant evidentiary matter which may be properly considered by a jury. Neither the jury verdict nor the judgments affirming that verdict require or even suggest that women or men with lifestyles akin to Petitioner's will be deprived of the custody of their minor children. They only affirm the right of juries to consider such lifestyles.

This Court's opinion in Stanley did not hold that Stanley's status with regards to his children was not a relevant factor to be considered in determining their custody. Similarly, this Court should not hold that Petitioner's lifestyle is not a relevant factor to be considered in determining the custody of her child.

Equal Protection

Petitioner's equal protection argument, like

her due process argument, is based on a factual inaccuracy, as illustrated by this quotation from Petitioner's Brief:

> "According to the Court of Civil Appeals in El Paso, the ex-husbands of single parents now need only show that the present custodian is dating a member of the opposite sex and traveling with him outside of the presence of the child." (Pet. Brief at 24-25). (emphasis added).

As previously pointed out, this was not the only evidence considered by the Court of Civil Appeals, see Pet. App. 6a-8a, and was but "one element" supporting the jury's verdict. Id. at 12a-13a. Furthermore, there is no basis for Petitioner's allegation that her status was even a "controlling factor" for the jury's verdict. Pet. Brief at 26. Absent any adequate factual support for Petitioner's allegations there would be no purpose served in responding to her legal arguments.

Equal Rights

Petitioner's equal rights argument is premised on two points: Petitioner's "beliefs" and Petitioner's "imagining."

In short, Petitioner "believes" the Texas Court of Civil Appeals would have viewed the case differently had the sex of her and Respondent been reversed, and "imagines" their attitude to be sexually discriminatory.

Such flights of imagination are wholly unsupported in Petitioner's brief or by the record. Absent any factual or legal foundation for Petitioner's argument, Respondent has nothing to respond to.

Freedom of Religion

After repeatedly alleging that the Court of Civil Appeals relied solely on Petitioner's lifestyle in affirming the jury's change of custody, Petitioner suddenly discovers the mention of church attendance in that Court's opinion and declares it to be "the only (other) evidence cited." The factual inaccuracy of this

allegation needs no discussion.

Petitioner does, however, argue that the mere mention of such evidence by the Court of Civil Appeals contravenes her First Amendment rights. Petitioner cites no authority for this proposition, but instead cites four Texas cases which hold that religious beliefs may not be relied upon to change custody.

In Watts v. Watts, 563 S.W.2d 314 (Tex. Civ. App.-Dallas, 1978) the Court was not even concerned with custody but with a trial court order requiring church attendance as a condition of visitation privileges.

In Noyes v. Jack, 443 S.W.2d 89 (Tex. Civ. App.-Beaumont 1969) the appellate court sustained the trial court's action in striking those portions of Plaintiff's pleading which complained of the lack of spiritual training given to the minor child by Defendant. In the instant case Petitioner made no objection to the evidence concerning church attendance and such facts were not alleged in any pleadings.

Similarly, in Frantzen v. Frantzen, 349 S.W.2d

769 (Tex. Civ. App. - San Antonio 1961) it was held that the trial court properly dismissed a divorce and child custody suit which was based wholly on allegations regarding the Defendant's religious beliefs.

Finally, in Salvaggio v. Barnett, 248 S.W.2d 244 (Tex. Civ. App.-Galveston 1952) the appellate court upheld the trial court's change of custody from the father to the mother despite the fact that the father's religious beliefs were a major factor in the trial court's decision. Although the appellate court did hold the father's religious beliefs to be an improper factual consideration, it still upheld the change of custody on the basis of all the other facts.

In view of the fact that Petitioner made no objection to the introduction of this evidence at trial, and in view of the other evidence adduced and relied on by the Court of Civil Appeals, Respondent urges that there is no showing of any infringement of Petitioner's freedom of religion.

Right Of Privacy

Respondent does not take issue with Petitioner's right to remain unmarried and choose her own lifestyle. Nor does Respondent contend that Petitioner's marital status or lifestyle bar her from having custody of her child.

Respondent does, however, urge that Petitioner's lifestyle was and is a legitimate matter which the jury had the right to consider in deciding custody of the child. It is important to reemphasize at this point that Petitioner's relationship with W.H. was not the only evidence before the jury. Petitioners second marriage, subsequent separation and ultimate divorce, all within eight months after her divorce from Respondent, were also in evidence, as was Petitioner's four different residences and three different jobs within twelve months. (Pet. App. 6a-8a).

Since Petitioner's right of privacy argument is premised on the allegation that the Texas Courts found that Petitioner's "unconventional lifestyle was sufficient

to support the answers to the jury verdict," (Petitioner's Brief at 35), and such allegation is factually inaccurate, Petitioner's argument is without merit.

CONCLUSION

Respondent submits that a writ of certiorari should not be granted in this cause for the following reasons:

(1) Petitioner's legal arguments are based upon isolated facts which present an inaccurate view of this controversy. Such inaccuracy is sufficient reason, under United States Supreme Court Rule 23(4), for denying the writ of certiorari.

(2) Petitioner has failed to comply at all with Rule 23 1(F) of this Court by specifying when and how the federal questions raised were presented to the Texas state courts and the way in which they were passed on by such courts. The reason for such non-compliance is because the federal questions were neither timely nor properly raised and this Court does not have jurisdiction.

(3) There are no federal questions involved in this case. Petitioner's alleged constitutional deprivations are based on an incomplete representation of the facts. When all the facts are considered it is apparent that the jury verdict in this case, and the appellate court affirmances thereof, have adequate evidentiary support and are not violative of Petitioner's constitutional rights.

Respondent therefore prays the Court to deny its writ of certiorari.

Respectfully submitted,

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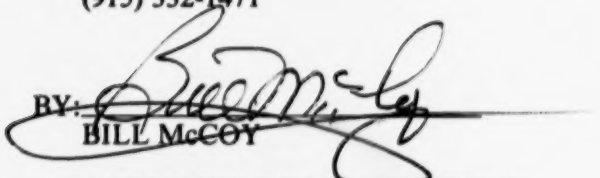

BY: BILL McCOY

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition to Writ of Certiorari has been mailed to the following attorneys for Petitioner:

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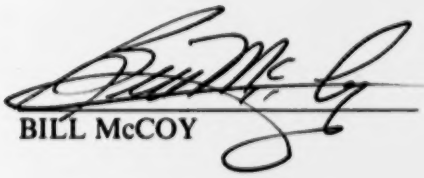
on this the 7 day of August, 1981.



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